Supreme Court, U.S.
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No. 02-1121

In The

# Supreme Court of the United States

KENNETH D. SANDSTAD,

*Petitioner,*

v.

CB RICHARD ELLIS, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will grant certiorari to consider Petitioner's contention that the Circuit Courts utilize conflicting definitions of direct evidence when the conflict is more semantic than real and when the result in this case, utilizing the direct evidence definition Petitioner proposes, would be the same.

2. Whether this Court will grant certiorari to consider Petitioner's contention that there is a conflict in the Circuit Courts as to the meaning of the "disinterested witnesses" language in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), when the only Circuit Courts to address the issue have been consistent, when there is no conflict in the Circuit Courts, and when the result in this case, even excluding the testimony of managers involved in the discharge decision, as Petitioner urges, would be the same.

3. Whether this Court will grant certiorari to consider Petitioner's contention that the Fifth Circuit ignored the *Reeves* decision of this Court in holding that it is permissible to make credibility determinations when reviewing summary judgment evidence when that was not the holding of the Fifth Circuit and when the Fifth Circuit, in this case, specifically cited *Reeves* for the proposition that it must avoid credibility determinations.

## PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Respondent, CB Richard Ellis, Inc. is wholly owned by CB Richard Ellis Services, Inc., which is not a publicly traded corporation. CB Richard Ellis Services, Inc. is wholly owned by CBRE Holding, Inc., which is not a publicly traded corporation. No publicly held corporations own any stock in CB Richard Ellis, Inc., CB Richard Ellis Services, Inc., or CBRE Holding, Inc.

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## RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, CB Richard Ellis, Inc. respectfully requests that this Court deny the petition for writ of certiorari.

## OPINIONS BELOW

The District Court's opinion is not reported and may be found in Petitioner's Appendix 15a. The opinion of the Court of Appeals is reported, *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893 (5th Cir. 2002), and may also be found in Petitioner's Appendix 1a.

## JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

## PROVISION OF LAW INVOLVED

29 U.S.C. § 623

It shall be unlawful for an employer – (1) to . . . discharge any individual . . . because of such individual's age.

## STATEMENT OF THE CASE

### A. Factual Background.

Respondent, CB Richard Ellis, Inc. ("CBRE") is a real estate services company that provides a wide range of

services in the commercial real estate industry. (3R.App. 1, ¶ 3)[1] Between 1990 and 1994, Petitioner, Kenneth D. Sandstad ("Sandstad") was the Central Division Manager of the Brokerage Business Unit ("Brokerage") of CBRE, reporting to its President, Gary Beban ("Beban"). (3R.App. 13, 14) (4R.App. 247-48) Brokerage, at that time, was organized along three geographic divisions within the United States. (4R.App. 248-49) In 1994, the Central Division was eliminated in favor of a two-division structure, Eastern and Western (4R.App. 254-55), and Sandstad, at the age of 48, assumed a new position – Senior Executive Vice President of Institutional Services. (4R.App. 242-43) (3R.App. 16)

In that new role, Sandstad reported to Dick Clotfelter ("Clotfelter"), who reported to the CEO James Didion ("Didion"). (4R.App. 243) In late November 1995, Sandstad received a negative performance review from Clotfelter questioning Sandstad's management style and noting his tendency to impose unnecessary work on subordinates and his failure to focus on essential tasks. (3R.App. 50-53, 49) (4R.App. 242) In early 1996, Sandstad returned to a Division Manager (Brokerage) position he had previously held and reported to Beban once again. (3R.App. 17)

Beginning in 1996, CBRE designed and implemented a Long-Term Leadership Orientation Program ("LDP"). (3R.App. 40) In a 1997 memo, Didion described the LDP as a program to "identify 30 to 50 younger managers and management candidates to serve as a pool of talent for

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[1] The evidence submitted by the parties on summary judgment (other than that attached to CBRE's Reply) is not consecutively numbered in the record. Thus, where CBRE refers to evidence it submitted in its Appendix of Summary Judgment Evidence, it will cite to the Record Volume and to the Appendix page of that volume (e.g., "4R.App. [page]").

promotion to senior management over the next 5+ years, ultimately replacing senior management." Brett White ("White"), who eventually replaced Beban as President of Brokerage Services and who terminated Sandstad, was a participant in the LDP.

Sandstad conceded that the purpose of the LDP, in part, was to bring in a group of producers, to expose them to the way the entire Company operated and to management, and to provide a pool of people who in the future could assume senior management positions if necessary. (5R.App. 314) He also conceded this would be a legitimate purpose for such a program. (5R.App. 349) Sandstad, a member of senior management at the time, did not assert that he should have been chosen to participate in the LDP, nor did he assert that there was discrimination in the selection of the individuals who participated in the LDP; rather, he claimed, without explanation, that "younger" managers were chosen to participate in the LDP and then proceeded to discuss, without any supporting expert testimony, the change in the average age of senior management. (Petition 4-5) However, he did not dispute that of the 26 individuals who participated in the LDP, 10 were 40 years of age or older and none were younger than 33 years of age, (3R.App. 2, ¶ 4), that of those 26, only six were subsequently promoted at varying times into senior management positions in the United States and two others were promoted into senior positions outside the United States, (3R.App. 2, ¶ 5), or that almost all of the senior management positions filled by these eight individuals were newly-created positions.[2] (3R.App. 2-3, ¶ 5)

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[2] All of these undisputed facts, including particularly the fact that almost all of the senior management positions filled by LDP participants

(Continued on following page)

In late 1996, after an initial public offering ("IPO"), CBRE became a publicly traded company. (3R.App. 76) In a Q&A document prepared in connection with the public offering, CBRE referenced the LDP and noted that the Company had a very clear plan "to integrate younger employees into the senior management team." (3R.App. 82-85, 95) This Q&A followed a question asking the Company to comment on the depth and experience/average tenure of the senior management team. The answer states that "the average tenure of that group is 27 years in the business and they are some of the most visible, highly competent people in the industry." (3R.App. 82-84, 94)

At one of the IPO road shows, a comment was made by a stock analyst to senior CBRE managers that there was too much gray hair on the management team. (5R.App. 373-74, 379-82) Sandstad testified that Walt Stafford ("Stafford"), CBRE's General Counsel, and Beban relayed to him that the comment was critical of the apparent age of the management team. (4R.App. 312-13) He also testified that Stafford indicated that the Company was going to have to do something about it.[3] (4R.App. 289-90) Sandstad conceded, however, that no one told him what was going to be done. (5R.App. 347)

In 1997, Beban moved from President of Brokerage Services to President of Corporate Services and Didion

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were *newly created positions,* render Petitioner's average age analysis meaningless.

[3] Because the LDP was implemented before the comment by the stock analyst, Petitioner ignores his own testimony about the legitimate purposes of the LDP and speculates, without citing to any evidence, that CBRE anticipated these concerns and implemented the LDP as a "plan" to reduce the age of CBRE executive management. (Petition 3)

selected White as Beban's replacement.[4] Thereafter, the Eastern and Western Divisions of Brokerage were eliminated and nine separate regions were created. (4R.App. 260-61) In January 1998, Sandstad was assigned the lead management role in the South Central Region, reporting to White. (4R.App. 262) Soon thereafter, White met with Sandstad and discussed, among other things, White's understanding that others had responded negatively to the level of detail imposed by Sandstad. (5R.App. 419-20) (4R.App. 309-11) In early March, 1998, White received a memorandum from Jerry Lumsden ("Lumsden"), who managed the Austin office and who reported to Sandstad, detailing Lumsden's frustration and concerns with Sandstad's leadership and behavior style. (3R.App. 151-52) (5R.App. 145-57)

In June, 1998, Sandstad sent White a memorandum detailing various issues within the South Central Region. (5R.App. 443, 450-52) Among other things, Sandstad admitted to White that Ran Holman ("Holman"), who was the Senior Manager in charge of the area which included Dallas/Fort Worth and who reported to Sandstad (5R.App.

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[4] Despite the fact that Petitioner, before the District Court, abandoned his failure to promote claim, he asserts that he was clearly better qualified than White for the position of President of Brokerage Services. (Petition 5) However, the evidence presented to the District Court failed to establish that Sandstad was as qualified as White, much less that he was clearly better qualified than White. Petitioner also asserts that Beban told him that Didion decided to "skip a generation" in promoting White. (Petition 5) Presumably because Beban was not involved in the discharge decision and Didion was, Petitioner represents to this Court that Beban, in making the comment about "generation skipping," was "quoting Didion." (Petition 14) However, Beban was not quoting Didion; rather, he told Sandstad that this is what he perceived Didion was doing. (1R. 148-49) (3R.App. 24-26)

327-28), was exasperated by a number of things and that he was concerned that Holman was ready to quit. (5R.App. 443, 450-52) White then met with Holman in Dallas, (5R.App. 421-25), and later advised Sandstad, by memorandum, that he perceived Holman to be extremely frustrated with the direction of the Dallas Market and his role within it and that the Dallas management team was extremely unstable. (5R.App. 426, 446-47) Thereafter, in July, 1998, White expressed to Sandstad, in writing, his concern about the relative instability and dissatisfaction of some members of Sandstad's management team and gave Sandstad's management of the Dallas market a negative review. (5R.App. 427, 453-55)

One month later, in August, 1998, Nina Petty ("Petty") filed a formal written complaint of gender discrimination against Sandstad. (4R.App. 159-60, 162) At that time, Petty was the Managing Officer of the Fort Worth office reporting directly to Sandstad. (3R.App. 123, 130) Included among Petty's allegations were the following: (1) that Sandstad selected Holman for the senior management position overseeing the Dallas Market without interviewing Petty even though she had more experience than Holman, (5R.App. 369-70, 386-88), (2) that Sandstad asked her to report to the office during her maternity leave and informed her that she should consider a job in production rather than management, (3R.App. 131), (3) that Sandstad excluded Petty from a team of managers to assist in the redesign of the operations of the South Central Region (the "Core Team"), (3R.App. 131), and (4) that Sandstad referred to her as a "mother hen." (3R.App. 138)

Sandstad does not deny that he referred to Petty in a written memorandum as a "mother hen," an action he now regrets. (5R.App. 345-46) He does not dispute the claimed actions and conversation during her maternity leave,

(5R.App. 318-19, 324-25), and he concedes that he had this conversation with Petty despite the fact that the manager to whom Petty reported at that time never told him that Petty was doing a poor job, (5R.App. 326), and despite the fact that there was no documentation of any performance problems with Petty. (5R.App. 326, 329-31) Additionally, Sandstad does not dispute that Petty was a Managing Officer and that he chose not to put Petty on the initial Core Team for the South Central Region even though she had been recommended for that assignment. (5R.App. 317)

The Company hired outside counsel, Rogge Dunn ("Dunn"), to conduct an investigation. Dunn, a Texas attorney who specialized in labor and employment law and who had extensive experience litigating employment disputes on behalf of both employees and employers, (3R.App. 97-98), interviewed Sandstad, Petty, and other employees in Sandstad's region. (3R.App. 102) (5R.App. 389-406) Thereafter, Dunn compiled a report that included summaries of the interviews he conducted. (5R.App. 375-76, 389-406) Dunn reported that employees complained about Sandstad's conduct and management style generally. (5R.App. 391-95) He also communicated his own impression of Sandstad – he concluded that Sandstad was a bully in the workplace, that he was not truthful during the investigation and that he had a bad management style that caused Holman and maybe one or two other people to consider leaving CBRE. (3R.App. 37, 103-05, 109-11, 114) Dunn also reported that while he thought Sandstad had not engaged in conduct rising to the level of Title VII gender discrimination, Sandstad's actions with regard to Petty were nonetheless inappropriate and placed CBRE at substantial risk of a jury verdict. (3R.App. 109-10, 112-13) (4R.App. 196-97)

Stafford, after meeting with Ray Wirta ("Wirta"), then the COO, and with Didion, then the CEO, recommended

Sandstad's discharge to White. (4R.App. 208-09, 178-79) (5R.App. 371-72, 378, 428-30, 460-68, 432) White then conferred with members of CBRE's legal department involved in the investigation and shortly thereafter discharged Sandstad. (5R.App. 430-33) (4R.App. 175-76) At the time he was discharged, Sandstad was told that his performance had been unacceptable, (4R.App. 282-83), that White and other senior managers at CBRE had lost confidence in his leadership, (4R.App. 282) (5R.App. 438-40, 407), and that his actions toward Petty were inappropriate and placed the company at substantial risk if she were to bring suit for gender discrimination. (3R.App. 3-4 ¶ 8) (4R.App. 283)

**B. District Court Proceedings.**

Sandstad filed the instant suit in the United States District Court for the Northern District of Texas, alleging that he was discharged in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* On December 5, 2000, Respondent filed a motion for summary judgment and on June 5, 2001, the District Court, Hon. Jorge A. Solis, granted summary judgment in favor of Respondent. The Court noted that Sandstad may show intentional discrimination either through direct or indirect evidence of discrimination. (Pet. App. 22a)

Addressing Sandstad's claim that he presented direct evidence of discrimination through age-related remarks, the Court noted that such remarks must be "direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate [Sandstad's employment]"; it also noted that such remarks must be "1) age related; 2) proximate in time to the termination; 3) made by an individual with authority over the employment

decision at issue; and 4) related to the employment decision at issue." (Pet. App. 23a) The Court concluded that remarks by the stock analyst and remarks concerning the purpose of the LDP did not constitute direct evidence that age discrimination motivated Sandstad's discharge almost two years later. Similarly, it concluded that a remark concerning Didion's decision to promote White to President of Brokerage Services was not direct evidence that Sandstad was discharged, more than one year later, because of his age. It reached these conclusions for various reasons, including the fact that the remarks were not proximate in time to Sandstad's discharge, were not made by an individual with authority over the discharge decision, and did not directly and unambiguously indicate that Sandstad or any other member of senior management would be terminated because of his or her age. (Pet. App. 23a-26a)

Turning to Sandstad's claim that he offered indirect evidence of discrimination, the Court presumed that Sandstad had been replaced by a younger employee (thus establishing a *prima facie* case of discrimination) and recognized that CBRE had presented a legitimate nondiscriminatory reason for discharging him – that CBRE's management had lost confidence in his ability to perform his duties as the South Central Region Manager based upon his management style and his actions toward Nina Petty. (Pet. App. 26a-27a) The Court then examined the evidence offered by Sandstad with "reasonable inferences to be drawn therefrom . . . in the light most favorable to [Sandstad]," (Pet. App. 26a), in order to determine if there was any evidence that the reason offered by CBRE was pretextual.

While not disputing that Dunn informed CBRE that he believed Petty would likely prevail if she filed suit for gender discrimination, Sandstad points to Dunn's conclusion that his actions did not rise to the level of a Title VII

violation. The Court concluded that Dunn's position regarding legal liability did not have anything to do with the Company's "reasonable belief that Sandstad's conduct had exposed the Company to significant legal risk," and did not constitute evidence of pretext. (Pet. App. 27a-28a) The Court also rejected, as unreasonable and unsupported, Sandstad's suggestion that CBRE tolerated sex discrimination, and that, therefore, its concern about the legal risk posed by his conduct toward Petty was pretextual.[5] (Pet. App. 28a) Addressing Sandstad's contention that he had been treated differently than a younger manager who had also been the subject of complaints, the Court found no evidence of pretext because the complaints directed at the younger manager were not sufficiently similar to draw any probative comparisons. (Pet. App. 30a) Addressing Sandstad's final pretext argument – that CBRE offered different reasons for terminating him – the District Court considered the evidence and found that "Defendant's reasons for terminating Plaintiff have not changed and thus provide no evidence of pretext." (Pet. App. 28a-29a)

### C. Court of Appeals' Proceedings.

In *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893 (5th Cir. 2002), the Fifth Circuit affirmed the decision of the District Court. The Fifth Circuit recognized that "[i]n accordance with *Reeves* we look only to whether a reasonable jury could find that [Sandstad's] evidence supports an

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[5] The Court noted that, absent other evidence [and there was none], the mere fact that there had been a judgment against CBRE for gender discrimination and thirteen complaints of gender discrimination [over a seven-year period] does not suggest that CBRE tolerated sex discrimination. (Pet. App. 28a)

inference of age discrimination." (Pet. App. 6a n.3) (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000)). In rejecting Sandstad's claim that he had presented direct evidence, the Fifth Circuit agreed with the District Court that the remarks were ambiguous, made by individuals not involved in the discharge decision, and not proximate in time to the discharge decision. (Pet. App. 6a-7a) Additionally, the Fifth Circuit noted that without the benefit of unreasonable inferences favoring Sandstad, the evidence concerning the purpose of the LDP could not be probative of discriminatory animus in the decision to discharge Sandstad two years later. (Pet. App. 10a-13a)

Rejecting Sandstad's contention that *Reeves* required the Court to disregard as "interested witness testimony" all testimony by managers involved in the employment decision, the Fifth Circuit stated that Sandstad's interpretation of *Reeves* "would in effect eliminate his burden to show that [CBRE's] explanation is pretextual. The burden on [CBRE] to produce a legitimate nondiscriminatory reason for terminating [Sandstad] is 'one of production, not persuasion; it can involve no credibility assessment.'" (Pet. App. 8a) (citing *Reeves*, 120 S.Ct. at 2106). The Fifth Circuit also noted that even if the testimony of CBRE's senior managers was excluded from consideration, other evidence in the record supported CBRE's explanation for its decision to discharge Sandstad. (Pet. App. 9a-10a)

The Court then proceeded to address Sandstad's argument that the remarks, previously rejected as direct evidence, constitute some evidence of pretext. (Pet. App. 10a-13a) In doing so, the Fifth Circuit recognized that one of its panels had chosen to apply a test different from the test traditionally utilized by the Court to examine workplace remarks. (Pet. App. 10a n.6) Nevertheless, the Court concluded that "the evidence offered by [Sandstad] would

produce the same result under either test. . . . " *Id.* In holding that comments regarding the purpose of the LDP did not provide any evidence of pretext, the Fifth Circuit acknowledged that such evidence, viewed favorably to Sandstad, "evidences a policy of keeping older employees from advancing to senior management positions. However, the inference that the [LDP] reflected a policy to fire older managers to make room for younger managers is both unreasonable and contradicted by independent, uncontroverted evidence."[6] (Pet. App. 12a)

The Fifth Circuit also rejected Sandstad's argument that he was treated differently from a younger manager. It noted that no formal complaint of gender discrimination had been filed against the younger manager, and agreed with the District Court that any comparison between the treatment of Sandstad and the younger manager would have no probative value. (Pet. App. 13a) The Fifth Circuit also agreed with the District Court that Sandstad had failed to present any evidence that would permit a reasonable inference that CBRE acted differently in its response to other complaints of discrimination. In so doing, the Court noted that Sandstad's evidence amounted to "no more than a list of the employees who have made complaints and a judgment against [CBRE] won by one complainant. The record contains no evidence of the substance of the complaints or actions taken by [CBRE] that would be probative of [CBRE's] attitude toward sex discrimination." (Pet. App. 13a)

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[6] As the District Court noted, "the evidence shows that only two senior managers have been fired since the four years the LDP was announced – plaintiff and another man, whom plaintiff admits was fired for making inappropriate comments during a public meeting." (Pet. App. 25a)

Stating that it had viewed the evidence as a whole and that it had drawn all reasonable inferences in Sandstad's favor, the Fifth Circuit found that "[Sandstad had] created no issue of material fact regarding [CBRE's] discriminatory animus in terminating him," and affirmed the judgment of the District Court. (Pet. App. 14a)

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO SPLIT IN THE CIRCUITS IN THE METHOD BY WHICH THEY DETERMINE WHETHER THERE IS DIRECT EVIDENCE OF DISCRIMINATION.

Sandstad suggests that this Court should grant certiorari to resolve an alleged conflict between the Fifth Circuit and the Eleventh Circuit regarding the definition of direct evidence in employment discrimination cases. (Petition 8-15) He labels the Fifth Circuit's standard for direct evidence the "dictionary definition" and the standard utilized by another Circuit, the Eleventh Circuit, the "preponderance definition." He then argues that the Eleventh Circuit's standard is more workable and better suited to employment discrimination claims. The difficulty with Sandstad's argument lies in its premise – the direct evidence standards utilized by the Fifth and the Eleventh Circuits, regardless of the label Sandstad wishes to apply, are not in conflict; they are essentially the same.

In *Sandstad*, the Fifth Circuit stated that "[d]irect evidence is evidence that, if believed, proves the fact of discriminatory animus without interference or presumption." (Pet. App. 6a-7a) (citing *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995)). Sandstad suggests, incorrectly, that this is the only standard by which courts within the Fifth Circuit assess whether evidence constitutes "direct evidence" of discrimination. In doing so, he

ignores the fact that the Fifth Circuit has traditionally applied a four-part test or standard, described in *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), to determine whether remarks related to a protected characteristic are direct evidence of discrimination. Following *Brown*, the District Court noted in its analysis of Sandstad's claimed "direct evidence" that "remarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the termination; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." (Pet. App. 23a) (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996). The four part test in *Brown* has repeatedly been approved by the Fifth Circuit as the appropriate test to determine whether a comment is probative of discrimination. *See, e.g.*, *Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 404-05 (5th Cir. 2001).[7] As such, contrary to Petitioner's suggestion, courts within the Fifth Circuit analyze allegedly discriminatory remarks, as did the District Court here, by assessing the nature of the remark, who made the remark, and the relationship between the remark and the employment decision at issue. As noted below, this analysis is essentially the same as the analysis utilized by the Eleventh

[7] We note that in *Sandstad* the Fifth Circuit recognized that one of its panels had chosen to apply a test different than that in *Brown*, a two-part test – "[o]ral statements constitute evidence of discrimination if they indicate age-based animus and the speaker is principally responsible for the plaintiff's firing." (Pet. App. 10a) (citing *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2001)). Nevertheless, the Fifth Circuit concluded that "the evidence offered by [Sandstad] would produce the same result under either test. . . ." (Pet. App. 10a)

Circuit, the only Circuit that Petitioner claims to be in conflict with the Fifth Circuit.[8]

In *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999), the Eleventh Circuit attempted to distinguish what it called the "dictionary definition" of direct evidence (which, the Court said, required a direct admission by the decisionmaker that discrimination motivated the decision) from its preferred "preponderance definition" – namely, "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic." *Id.* at 1301. This standard for direct evidence, while semantically different, is essentially the same as that enunciated by the Fifth Circuit in *Mooney*, *Brown*, and *Russell*. The Eleventh Circuit's requirement that evidence, to be "direct evidence," must establish a causal link between the complained-of action and a protected trait is, in substance, the same as the Fifth Circuit's requirement in *Brown* that remarks, to be evidence of age discrimination in a termination case, must be age related, proximate in time to the termination, made by an individual with authority over the termination decision and related to that decision.[9]

In *Wright*, the Eleventh Circuit examined its precedent and found that while a majority of its courts stated the "dictionary definition" of direct evidence, they were in

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[8] Petitioner contends as follows: "The Circuits split as to the definition of 'direct evidence.' Some Circuits require substantial evidence of discriminatory animus to constitute direct evidence." (Pet. App. 10) However, he cites no authorities for this broad contention other than decisions of the Eleventh and Fifth Circuits.

[9] The same is true with respect to the *Russell* test applied by one panel of the Fifth Circuit.

fact analyzing the evidence under the "preponderance definition." 187 F.3d at 1294. By way of example, *Wright* discussed *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318 (11th Cir. 1998). There, the Eleventh Circuit held that statements did not constitute direct evidence of discrimination because they were made by individuals unconnected with the decision-making process and because the only statement made by a decisionmaker was "removed in both time and subject matter from the contested employment decision." *Id.* at 1330-31. Not surprisingly, these are the same considerations that courts in the Fifth Circuit utilize, per the *Brown* decision, in determining whether statements may constitute direct evidence of discrimination.

Sandstad says that the Fifth Circuit applies a "dictionary definition of direct evidence [that] effectively requires a confession by the decision maker. . . . " (Petition 12) In direct contrast to this statement, he immediately thereafter acknowledges that the Fifth Circuit has applied "in actuality" a preponderance definition, and cites four Fifth Circuit decisions in which the Court found "direct evidence." (Petition 12) Fifth Circuit precedent, as Petitioner acknowledges, clearly reveals that there is no split in the Circuits, and that, in actuality, courts within the Fifth and Eleventh circuits utilize essentially the same considerations in evaluating whether evidence rises to the level of "direct evidence" of discrimination.

Sandstad also suggests that the Fifth Circuit has strayed from the requirement for "direct evidence" set

forth by Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (Petition 11-12) There, in discussing the necessary threshold for direct evidence of discrimination that would trigger a mixed motive analysis, Justice O'Connor, in a concurring opinion, required that the plaintiff produce "direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision." 490 U.S. at 276. Once again, the difficulty with Sandstad's argument lies in its premise – that there is a real difference, as opposed to a semantic difference, between the standard enunciated by Justice O'Connor and the standards utilized by the Fifth Circuit. In fact, however, there is no substantive difference. The *Sandstad* court, and the District Court below, carefully analyzed Petitioner's evidence and concluded, just as the Eleventh Circuit would have concluded, that he failed to present direct evidence of discrimination.

Sandstad argued that the following evidence constituted "direct evidence" of discrimination: 1) a comment approximately two years before he was discharged by an individual not employed by CBRE that there was "too much gray hair in company management," 2) comments regarding the purpose of the Long Term Leadership Development Plan, adopted two years before he was discharged, regarding the identification of younger managers who potentially may be promoted into senior management, and 3) a comment by a non-decisionmaker that Didion, one of the decisionmakers, had chosen, approximately one year before Sandstad was discharged, to "skip a generation" in promoting White to President of Brokerage Services. The District Court, and the Fifth Circuit in *Sandstad*, properly considered this evidence, in conjunction with established Fifth Circuit precedent, and correctly concluded that it did not constitute direct evidence of discrimination. Because none of this evidence would

permit a reasonable trier of fact to find, more probably than not, a causal link between Sandstad's age and his discharge, the same conclusion would be reached utilizing the Eleventh Circuit's standard discussed in *Wright*. Similarly, because none of this evidence could be characterized as direct evidence that age was a substantial factor in his discharge, the same conclusion would be reached utilizing the standard expressed by Justice O'Connor in *Price Waterhouse*.

The fact that the District Court and the Fifth Circuit, in *Sandstad*, did not conclude that Petitioner had presented direct evidence of discrimination does not suggest that the direct evidence standard utilized by the Fifth Circuit is inconsistent with the Eleventh Circuit, or any other Circuit. In principle, and in practice, it is not. In *Reeves,* Justice O'Connor examined an ostensible conflict between the Circuits with respect to the evidence a court is required to consider in ruling on a Fed. R. Civ. P. 50 motion. In doing so, Justice O'Connor stated that "[o]n closer examination, this conflict seems more semantic than real." *Reeves*, 120 S.Ct. at 2110. Similarly, the ostensible conflict between the standards enunciated by the Eleventh Circuit and the Fifth Circuit is more semantic than real. As such, even if the courts below had utilized the *Wright* standard for direct evidence, they would have reached the same conclusion – that Sandstad had failed to offer direct evidence of discrimination.

Clearly, Petitioner's dispute is with the conclusion appropriately reached by both courts below that the evidence he presented was ambiguous, not connected to the decisionmakers and unrelated, both in context and time, to the decision to discharge him, and, thus, did not constitute direct evidence of discrimination. Such a dispute is not remotely worthy of this Court's review.

## II. THE FIFTH CIRCUIT'S UNWILLINGNESS TO ADOPT PETITIONER'S INTERPRETATION OF THE *REEVES'* LANGUAGE REGARDING "DISINTERESTED WITNESSES" IS NOT INCONSISTENT WITH *REEVES* AND DOES NOT CREATE A SPLIT IN THE CIRCUITS.

In *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097 (2000), this Court explained that courts in entertaining a motion for judgment as a matter of law or for summary judgment, "should review all of the evidence in the record." *Id.* at 2110. This Court also stated that "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* (citing 9A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2529 p. 299 (2d ed. 1995)). Still relying upon Wright & Miller, this Court further stated as follows:

> That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300.

120 S.Ct. at 2110.

Without citing to any precedent, Petitioner urged the Fifth Circuit to accept his own interpretation of the "disinterested witnesses" language, quoted in *Reeves,* from Wright & Miller. Specifically, he urged the Fifth Circuit to conclude that *Reeves* requires courts "to disregard as interested witness testimony *all testimony* by managers involved in the employment decision." (Pet. App. 8a) (*emphasis added*). The Fifth Circuit declined to do so, and specifically recognized that adopting his interpretation would be inconsistent with the well-recognized principle that the burden on an employer to produce a legitimate

nondiscriminatory reason for its employment action is "one of production, not persuasion; it can involve no credibility assessment." (Pet. App. 8a) (quoting *Reeves,* 120 S.Ct. at 2106)). The Fifth Circuit also recognized that adopting Sandstad's interpretation would also, in effect, eliminate his burden to show that CBRE's reasons for discharging him were pretextual. (Pet. App. 8a) As further support for its holding that the "disinterested witnesses" language in *Reeves* could not mean what Petitioner suggests, the Fifth Circuit cited a Seventh Circuit decision, *Traylor v. Brown, et al*, 295 F.3d 783 (7th Cir. 2002), which examined the same language in *Reeves* and reached the same conclusion.

### A. There is no split in the Circuits.

Petitioner contends that the Fifth and Seventh Circuits are at odds with every other Circuit as to the meaning of the phrase "disinterested witness" as used in *Reeves*. (Petition 16) Petitioner cites to ten decisions to support this contention, but does not analyze or discuss any of them. (Petition 16 n.7) Reviewing each of the cited cases reveals that none of them conflict with *Sandstad* and that, contrary to his contention, there is no split in the Circuits. In nine of the ten cases, the courts did not comment upon or discuss the meaning of the phrase "disinterested witness;" indeed, in five of the cited cases, there is not even a reference to the phrase "disinterested witnesses."[10]

[10] *See Malacara v. City of Madison*, 224 F.3d 727 (7th Cir. 2000) (the meaning of the phrase "disinterested witness" was not commented upon or discussed); *Armour v. The County of Beaver, Penn.*, 271 F.3d 417 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 1963 (2002) (same); *White v. Burlington Northern & Santa Fe Ruy. Co.*, 310 F.3d 443 (6th Cir. 2002), *rehearing en banc granted, judgment vacated*, ___ F.3d ___, 2003 WL

(Continued on following page)

Further, Petitioner goes so far as to represent to this Court that the Circuit Courts referenced at p. 16 n.7 of the Petition, "disregard[ed] the testimony of interested witnesses," (Petition 17), when, in fact, none of the decisions cited by Petitioner include any references to testimony being disregarded because it emanates from an "interested witness."

Other than *Traylor* and *Sandstad*, which reject Petitioner's interpretation of the "disinterested witnesses" language in *Reeves*, the only case cited by Petitioner which addresses, albeit in passing, the meaning of that language is *Wilcox v. State Farm Mut. Automobile Ins. Co.*, 253 F.3d 1069 (8th Cir. 2001). In *Wilcox*, the plaintiff argued that because his supervisor "worked for State Farm he was not a disinterested witness . . . [and his] affidavit should have been ignored." 253 F.3d at 1070. The Eighth Circuit rejected this argument, suggesting that the Supreme Court in *Reeves* "was intimating that there are some cases in which uncontroverted testimony from an interested party could be given credence. . . . " 253 F.3d at 1070-71. It then stated:

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548883 (6th Cir. Feb. 11, 2003) (same); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276 (9th Cir. 2001), *cert. dism'd*, 123 S.Ct. 816 (2003) (same). *See also Fester v. Farmer Bros. Co.*, 49 Fed. Appx. 785, 2002 WL 31323499 (10th Cir. Oct. 17, 2002) (the meaning of the term "disinterested witness" was not commented upon or discussed and, moreover, that term never even appeared in the case); *Mickle v. Morin*, 297 F.3d 114 (2nd Cir. 2002) (same), *EEOC v. Bd. of Regents of the Univ. of Wisconsin System*, 288 F.3d 296 (7th Cir. 2002) (same), *Warren v. Prejean*, 301 F.3d 893 (8th Cir. 2002) (same) and *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) (same).

> It would seem to us that in this case, where Mr. Wilcox was given a clear opportunity to contradict [his supervisor's] affidavit but did not, it would not be obvious error to include the affidavit's contents in the factual mix relevant to summary judgment. In any event, we think that it is unnecessary to decide the question because the record contains insufficient evidence to support an inference that State Farm's proffered reason for terminating [the employee] was pretextual even if [his supervisor's] affidavit is put aside.

253 F.3d at 1071. As such, *Wilcox* does not conflict with the holdings in *Traylor* and *Sandstad.*

Additionally, close to the time the Petition was filed, the Sixth Circuit issued an unpublished decision that is consistent with the only two other courts that have squarely addressed the issue – *Sandstad* and *Traylor. Almond v. Abb Industrial Systems, Inc.*, 2003 WL 173640 (6th Cir. January 22, 2003) (unpublished). In *Almond*, the Sixth Circuit rejected the argument that when "considering a motion for summary judgment, the court must entirely ignore all testimony by witnesses associated with the employer." *Almond*, 2003 WL 173640 at *2. The Court noted that this argument "both over-reads *Reeves* and leads to absurd consequences. If plaintiffs were correct, there could be no summary judgment for the defendant after the plaintiff makes a prima facie case as the defendant's proffered non-discriminatory reason by necessity has to be provided by defendant's witnesses." *Almond*, 2003 WL 173640 at *2, citing, *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994) and *Reeves*, 120 S.Ct. 2109-10 (contemplating that at least some evidence provided by the employer may be considered on summary judgment). There is not, as Petitioner suggests, a split in the Circuits.

### B. *Reeves* does not require courts to disregard all testimony by managers involved in the employment decision at issue.

Petitioner states, "[i]n using the term 'disinterested witnesses' in *Reeves*, the Court must have meant something," (Petition 18), and then suggests that what this Court must have meant is that any manager involved in the employment decision necessarily is an "interested witness" and his or her testimony must be disregarded. (Petition 16-18) He then presumptuously concludes that if this Court did not mean what he suggests it meant, then "as a practical matter, there is no such thing as an 'interested witness' for purposes of employment discrimination cases." (Petition 18)

However, Petitioner's interpretation would have the ridiculous effect of preventing an employer, in most instances, from offering the reason for the challenged employment decision. This would be directly at odds with this Court's recognition, in *Reeves*, that "the employer is in the best position to put forth the actual reason for its decision." 120 S.Ct. at 2109. Petitioner's suggestion is also at odds with the manner by which this Court, in *Reeves*, considered the summary judgment evidence offered by Reeves and by his employer. Immediately after discussing the appropriate standard by which to review such evidence, Justice O'Connor proceeded to apply that standard to the evidence. 120 S.Ct. at 2110. In so doing, Justice O'Connor did not indicate that the Court was required, as Petitioner suggests, to disregard the testimony of Sandra Sanderson, the company president who discharged Reeves. To the contrary, such testimony was specifically referenced

and obviously considered by this Court.[11] 120 S.Ct. at 2111. (" . . . Sanderson testified that she fired Petitioner because he had 'intentionally falsif[ied] company pay records. . . . '").

Moreover, Wright & Miller, the authority quoted by *Reeves* for the proposition that courts should give credence to evidence supporting the movant at least to the extent that it comes from "disinterested witness," also states that under some circumstances even the testimony of an interested witness "must be believed," 9A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2527, at 287-88 (2d ed. 1995), and that "[t]he testimony of an employee of the [movant] must be taken as true when it disclosed no lack of candor, the witness was not impeached, his credibility was not questioned, and the accuracy of his testimony was not controverted by evidence, although if it were inaccurate it readily could have been shown to be so." *Id.* at 287 n.9 (citing *Chesapeake & Ohio R.R. v. Martin*, 283 U.S. 209 (1931)). In *Chesapeake & Ohio R.R.*, this Court stated that testimony of the moving party that "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and . . . is not opposed to the probabilities, nor, in its nature, surprising or suspicious, [need not be] den[ied] conclusiveness." *Chesapeake & Ohio R.R.*, 283 U.S. at 218. As such, Wright & Miller clearly does not embrace Petitioner's suggestion that all testimony of managers involved in the employment decision at issue must be ignored by the courts.

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[11] That Reeves was able to show that the reason offered by Sanderson in her testimony was pretextual does not alter the fact that such testimony was, contrary to Petitioner's suggestion, properly considered in this Court's analysis of Reeves' pretext claim.

Just as this Court properly considered the testimony of the company president as to why she discharged Reeves, the Fifth Circuit and the District Court properly considered the testimony of CBRE's managers explaining the legitimate, nondiscriminatory reasons why Petitioner was discharged.

### C. Even if the courts below were to disregard the testimony of the managers involved in the decision to discharge Petitioner, as he urges, Respondent offered substantial evidence, in addition to testimony evidence, supporting its reasons for discharging him.

Petitioner notes that "[t]he Fifth Circuit in *Sandstad* did not suggest anyone who could possibly be an 'interested witness' in an employment discrimination case if the managers involved in the employment decision do not fit this definition." (Petition 19) However, the Fifth Circuit was not required to do so in this case because, as noted in *Sandstad,* "the record reveals support other than the testimony of senior managers for [CBRE's] explanation." (Pet. App. 9a) Specifically, the Fifth Circuit recognized that the legitimate, nondiscriminatory reason offered by CBRE for discharging Sandstad was supported by evidence other than testimony of the decisionmakers and that such evidence included interview summaries authored by the attorney hired to investigate Petty's complaint, a written performance review of Sandstad, memoranda concerning Sandstad authored by individuals who reported directly to him, memoranda authored by Sandstad, and even Sandstad's deposition testimony. (Pet. App. 9a) As such, even if the courts below had disregarded the

testimony of the managers who discharged Sandstad, Respondent clearly met its burden of producing a legitimate nondiscriminatory reason for the discharge.[12]

Because there is no split in the Circuits regarding the meaning of the "disinterested witnesses" language in *Reeves*, because that language clearly does not mean, as urged by Petitioner, that testimony from any manager involved in the challenged employment decision must be disregarded, and because CBRE produced substantial evidence, other than testimony from the decisionmakers, supporting its legitimate, nondiscriminatory reason for discharging Sandstad, review of this question presented is neither necessary nor warranted.

## III. THE FIFTH CIRCUIT DID NOT HOLD THAT COURTS, IN DECIDING A CASE OF INDIRECT DISCRIMINATION, MAY DETERMINE THE CREDIBILITY OF AN EMPLOYER'S EXPLANATION OF THE CHALLENGED DECISION.

Sandstad suggests, at pp. 20-22 of the Petition, that the Fifth Circuit, in *Sandstad*, disagreed with the mandate in *Reeves* that in the context of examining circumstantial evidence of discrimination, credibility determinations are

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[12] The purpose of Petitioner's reference to four hypothetical fact scenarios is unclear. (Petition 18-19) It does appear that Petitioner is suggesting that *Reeves* stands for the proposition that the employer in fact scenarios (1) and (3) could not even explain why it fired the plaintiff. Clearly, such a suggestion is nonsensical and inconsistent with this Court's holding that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (*emphasis added*), quoted in *Reeves*, 530 U.S. at 143.

jury functions, not those of a judge. This clearly is not the holding of the Fifth Circuit. Indeed, in discussing the standard of review, *Sandstad* cites *Reeves* for the proposition that "[i]n reviewing the evidence, we must draw all reasonable inferences in favor of the nonmoving party, and *avoid credibility determinations* and weighing of the evidence." (Pet. App. 4a-5a) (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 (2000) (*emphasis added*)). Following this dictate, both lower courts made no credibility determinations with respect to the reason offered by Respondent for discharging Sandstad. Rather, in addressing Sandstad's claimed evidence of pretext, both courts viewed the evidence with all reasonable inferences favoring Sandstad and concluded, properly, that he had failed to offer any evidence of pretext.

Petitioner suggests, illogically, that the Fifth Circuit's citation to two Seventh Circuit decisions necessarily means that the Fifth Circuit, contrary to *Reeves*, "[empowers] judges to make credibility determinations of a defendant's explanation of the discharge at issue." (Pet. App. 20-21) It is disingenuous, at best, to suggest that by citing two decisions from another Circuit, neither of which suggests that credibility determinations may be made by the trial court, the Fifth Circuit has now adopted a position that is inconsistent with *Reeves* and also with its recognition, earlier in the *Sandstad* decision, that it "*must . . . avoid credibility determinations. . . .* " (Pet. App. 4a-5a)

*Sandstad* cited both Seventh Circuit decisions in the context of its examination of Sandstad's contention that "*Reeves* requires us to disregard as interested witness testimony all testimony by managers involved in the employment decision." (Pet. App. 8a) The Fifth Circuit disagreed and stated as follows:

> The definition of an interested witness cannot be so broad as to require us to disregard testimony from a company's agents regarding the company's reasons for discharging an employee. As the Seventh Circuit noted in *Traylor v. Brown, et al*, 295 F.3d 783 (7th Cir. 2002), to so hold would foreclose the possibility of summary judgment for employers, who almost invariably must rely on testimony of their agents to explain why the disputed action was taken.

(Pet. App. 9a) Throwing logic out the window, Petitioner, after quoting the above language, states "[t]he candid announcement that the Fifth Circuit (and the Seventh Circuit) want to make credibility determinations to safeguard the possibility of summary judgment for employers is (1) no basis for defying an express holding of this Court and (2) flawed reasoning." (Pet. App. 20) Clearly there was no such "announcement," candid or otherwise.

The Fifth Circuit quoted another Seventh Circuit decision, *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994), as further support for its disagreement with Petitioner's interpretation of the "disinterested witnesses" language in *Reeves*. (Pet. App. 8a-9a) *Sandstad* stated that Petitioner's interpretation of *Reeves* – that courts must disregard as interested witness testimony all testimony by managers involved in the employment decision – "would in effect eliminate his burden to show that [the employer's] explanation is pretextual. The burden on [the employer] to produce a legitimate nondiscriminatory reason for terminating [plaintiff] is 'one of production, not persuasion; it can involve no credibility assessment.'" (Pet. App. 8a) (citing *Reeves*, 120 S.Ct. at 2106 and quoting *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994)).

Petitioner presumably contends that the quoted language from *Futrell* indicates that courts are free to

make credibility determinations. It does not. The language from *Futrell*, quoted by the Fifth Circuit in *Sandstad,* is as follows:

> "[I]n indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue *simply because juries have the exclusive right to judge credibility*."

(Pet. App. 8a-9a) (*emphasis added*). The *Futrell* court was merely stating that an employee claiming discrimination cannot avoid summary judgment simply by arguing that a jury is entitled to disbelieve the employer's explanation. Indeed, the message of the language in *Futrell* is entirely consistent with the circumstantial method of proof – requiring an employee to present additional evidence once the employer has met its burden of producing a legitimate nondiscriminatory reason – set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1975). *Futrell* clearly does not say, as Petitioner suggests, that courts are free to make credibility determinations concerning a defendant's explanation for the employment decision at issue, and the Fifth Circuit's reliance upon *Futrell* similarly does not suggest, in any way, that this is, or has ever been, a holding of the Fifth Circuit.[13]

In addition to misreading *Futrell*, Petitioner quotes language from the *Futrell* decision that was neither quoted nor referenced by the Fifth Circuit in *Sandstad*. He then implies, without any basis for doing so, that the Fifth Circuit is in agreement with the additional language he

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[13] For this reason, Petitioner's suggestion, at p. 21 of the Petition, that there is a split in the Circuits has no merit.

chose to quote from *Futrell*.[14] (Pet. 21-22) Petitioner's suggestion that the *Sandstad* court adopted or agreed with language from another circuit court that was neither quoted nor referenced in the *Sandstad* decision is, quite clearly, neither justified nor warranted.

Because the Fifth Circuit has not held that credibility determinations may be made by the court in assessing an employer's reason for the challenged employment decision, and because no such credibility determination was made by the District Court or by the Fifth Circuit in *Sandstad*, review of this additional question presented is unnecessary.

## CONCLUSION

For the reasons set forth above, this case raises no issue worthy of review by this Court. Respondent respectfully requests, therefore, that the petition for writ of certiorari be denied.

Respectfully submitted,

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[14] We note that the additional *Futrell* language quoted by Petitioner – "If the evidence does not amply support a plaintiff's claim that the defendant's explanation is unworthy of credence, judgment as a matter of law is entirely appropriate" – says nothing about courts making credibility determinations.